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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 330 and 331.

PETER L. McDONNELL, *Petitioner,*

vs.

THE UNITED STATES.

DOMINIC A. TRUDA, *Petitioner,*

vs.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR PETITIONERS.

ROBERT ASH,
Attorney for Petitioners,
Munsey Building,
Washington, D. C.

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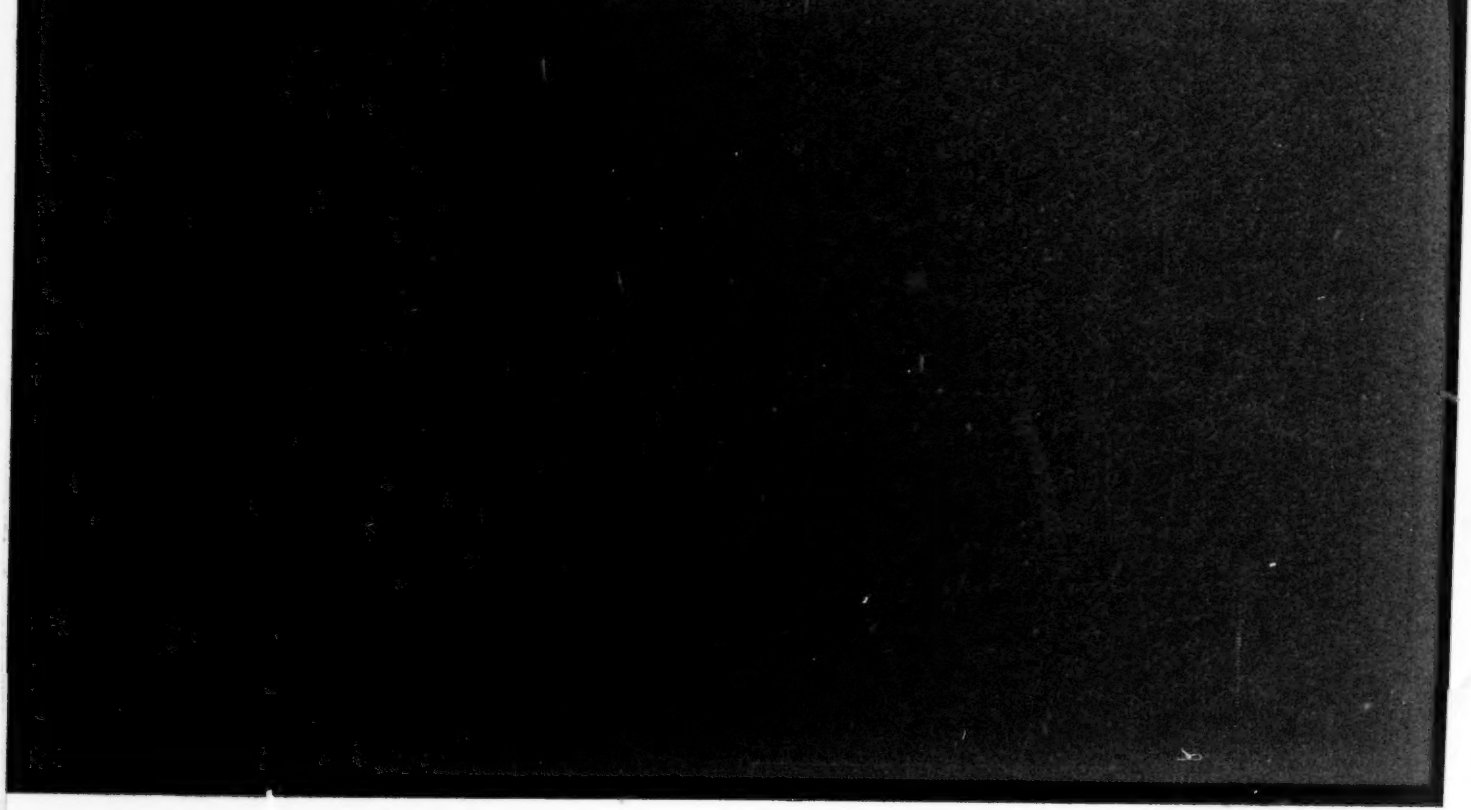

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BRIEF FOR PETITIONERS.

OPINION BELOW.

The opinion of the Court of Claims in the McDonnell case (R. 6-16) is reported in 59 Fed. (2d) 290. As yet the memorandum opinion in the Truda case (Truda R. 6-11), which was decided on the authority of the McDonnell case, is not reported in the Federal Reporter. It is reported, however, at ¶1309 of the Prentice-Hall 1932 Federal Tax Service.

JURISDICTION.

The judgment of the Court of Claims was entered in each case May 31, 1932. The petitions for certiorari were filed August 31, 1932, and were granted October 24, 1932, "limited to the question of the validity of the waiver under Section 278 (e) of the Revenue Act of 1924." Jurisdiction is conferred upon this Court by Section 240 of the Judicial Code as amended by Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED.

The question presented is limited by the order allowing certiorari to the following:

> Does Section 278(e) of the Revenue Act of 1924 render invalid waivers executed after the enactment of the Revenue Act of 1924 with respect to taxes the assessment and collection of which had become barred prior to the enactment of the Act.

STATUTES AND REGULATIONS INVOLVED.

Section 277 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299 (U. S. C. Title, 26, Sec. 1057), provides:

> Sec. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—
>
> * * * *
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court

for the collection of such taxes shall be begun after the expiration of such period.

Section 278 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300 (U. S. C., Title 26, Secs. 1058, 1059, 1060, 1061, 1062), provides:

> Sec. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.
>
> (b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234, of the Revenue Act of 1918 or the Revenue Act of 1921, may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.
>
> (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.
>
> (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.
>
> (e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

Article 1271 of Regulations 65 provides in part:

> Art. 1271. Period of limitation upon assessments of tax.—The amount of tax imposed by the Revenue Act of 1921 and by such Act as amended for the taxable years 1921, 1922, and 1923, and the amount of tax imposed by the Revenue Act of 1924 for the taxable year 1924, or succeeding taxable years, must be assessed within four years after the return was filed, and the amount of tax imposed by the Act of August 5, 1909, the Act of October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such act as amended, must be assessed within five years after the return was filed, with the following exceptions:
>
> * * * * * * * * *
>
> (6) If the Commissioner and the taxpayer consent in writing to the assessment of the tax after the expiration of the four-year period or five-year period prescribed by section 277(a) of the statute as the period in which the assessment must be made, the tax may be assessed at any time prior to the expiration of the period agreed upon.

Article 1273 of Regulations 65 provides in part:

> Art. 1273. Cases where period of limitation on assessment and collection of tax under Revenue Act of 1924 is not retroactive.—Subdivision (e) of section 278 of the statute provides that no provision of that section shall authorize an assessment of any tax or its collection by distraint or by proceeding in court if such assessment, distraint, or proceeding in court was barred by the period of limitation in existence at the time of the enactment of this Act. * * *

STATEMENT OF THE CASE.

March 29, 1918, and April 1, 1918, Truda and McDonnell, respectively, filed their individual income tax returns for 1917. April 1, 1918, the partnership McDonnell & Truda, which was composed of the two petitioners herein, filed its

partnership return for 1917 on Government Form 1065 (McDonnell R. 7; Truda R. 6).

March 18, 1923, the Commissioner of Internal Revenue made a jeopardy assessment against the partnership in the amount of $100,005.14. A claim in abatement protesting this jeopardy assessment was filed.

November 30, 1925, the Commissioner of Internal Revenue, wrote the petitioners stating that a consideration of the appeal of the partnership for assessment under Section 210 ("special assessment") of the Revenue Act of 1917 indicated that there was an overassessment against the partnership of $75,141.86. "However, a reduction of the excess-profits tax liability of the partnership necessitates a corresponding increase in the distributive interests of the partners and a corresponding increase in the taxable net income, resulting in an additional tax liability for each partner." McDonnell's additional tax liability was stated as $6,877.62 and Truda's $5,485.18 (McDonnell R. 7; Truda R. 7). The letters then stated:

> "Inasmuch as the limitation of time within which to assess the $6,877.62 ($5,485.18 in Truda's case) has expired, you are requested to execute and return to this office the enclosed form of waiver, to facilitate the adjustments of the partnership's overassessment and your resulting additional tax liability." (McDonnell R. 7; Truda R. 7.)

December 17, 1925, the Commissioner mailed the following letter to the partnership:

> "Receipt is acknowledged of your letter dated December 10, 1925, wherein you state that a letter has not as yet been received by you showing the amount of income and excess profits tax finally determined to be due for the year 1917, and requesting that this letter be forwarded before compliance with the request of this office in bureau letters dated November 30, 1925,

that waivers be furnished for the partners, Peter L. McDonnell and Dominic A. Truda.

"In the letters to Peter L. McDonnell and Dominic A. Truda mentioned above, they were advised that an audit of the partnership of McDonnell and Truda under section 210 of the revenue act of 1917 resulted in the determination of an overassessment of $75,141.86.

"The audit of the partnership can not be completed and no further action can be taken until waivers are on file for Peter L. McDonnell and Dominic A. Truda. When these waivers are received properly signed, a letter will be issued to you showing the computation of the tax resulting in the above overassessment." (McDonnell R. 8; Truda R. 7.)

February 26, 1926, the Commissioner, not having had replies from the petitioners to his letters of November 30, 1925, wrote the petitioners. McDonnell's letter, which is identical with Truda's except as to the amount of tax, is:

"Reference is made to bureau letter, dated November 30, 1925, wherein you were advised that an audit of your income-tax return for the year 1917 resulted in the determination of a deficiency in tax of $6,877.62 due to assessment under the provisions of section 210 of the revenue act of 1917 of the partnership of McDonnell and Truda, of which you are a partner, and requesting you to execute a waiver which was inclosed for the purpose, in order that adjustment could be made of the overassessment of $75,141.86 determined for the partnership.

"Under date of December 17, 1925, in reply to a letter from the above-named partnership dated December 10, 1925, the partnership was advised that no further action would be taken until waivers are on file from you and your partner, Mr. Dominic A. Truda.

"You are, therefore, requested to execute and return to this office the inclosed form of waiver within fifteen days from the date of this letter in order that adjustment of the partnership's overassessment and your resulting additional-tax liability may be made."

February 23, 1926, the petitioners and the Commissioner executed consents in writing to the assessment and collection of any tax determined to be due by the Commissioner for 1917 beyond the period of limitation provided in the statute. The consents waived "the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1917 under existing revenue acts, or under prior revenue acts, to the extent of $6,877.62 (in Truda's case $5,485.18) conditioned upon the proposed additional assessment against McDonnell & Truda for the year 1917 of excess-profits tax, the sum being fixed at $24,863.28." (McDonnell R. 9; Truda R. 8.)

May 22, 1926, the Commissioner mailed to the partnership a letter advising that the additional assessment against the partnership had been reduced from $100,005.14 to $24,863.28. (McDonnell R. 9. Truda R. 9.)

May 22, 1926, the Commissioner notified the petitioners by what is commonly known as "thirty-day letters" of the proposed assessment of deficiencies for 1917 of $6,877.66 in the case of McDonnell and $5,485.18 in the case of Truda. (McDonnell R. 10; Truda R. 9.)

McDonnell protested the amount of the proposed additional tax and on July 12, 1926, the Commissioner acknowledged the said protest and reduced the amount of the additional tax to $4,386.15. (McDonnell R. 11.)

July 17, 1926, the Commissioner made an additional assessment of tax against Truda of $5,485.18 plus interest of $128.64 which was paid August 13, 1926. (Truda R. 10.)

October 9, 1926, the Commissioner made an assessment of additional tax against McDonnell of $4,386.15. This amount, together with interest thereon, aggregating $4,549.03, was paid October 23, 1926. (McDonnell R. 11.)

December 24, 1928, Truda filed a claim for refund of $5,613.82 on the ground that the waiver of the statute of

...tions theretofore executed by him was invalid and that the amount claimed was collected after the running of the statute of limitations. The claim was rejected by the Commissioner July 25, 1929. (Truda R. 10.) Suit was filed in the Court of Claims January 22, 1930. (Truda R. 1.)

McDonnell filed two claims for refund on December 27, 1928, and May 31, 1929, respectively, alleging, in addition to another ground, that the consent filed by him waiving the statute of limitations was invalid and that the tax was, therefore, collected after the running of the applicable period of limitations. The claims for refund were rejected March 6, 1929, and July 25, 1929, respectively. (McDonnell R. 11.) Suit was filed in the Court of Claims November 4, 1929. (McDonnell R. 1.)

ARGUMENT.

This case presents an interesting question of statutory construction but, as compared with most of the tax cases considered by this Court, is relatively unimportant in its effect upon the public revenue or any large group of taxpayers. The memorandum filed in behalf of the Government when the petition for certiorari was pending states (p. 6):

> "Although the question is narrow in its scope, and its decision by this Court will control only cases where an assessment was barred on the date of the enactment of the Revenue Act of 1924, and where a waiver consenting to a later assessment and collection of the tax was given after that date and before the date of the enactment of the Revenue Act of 1926, we are advised by the Bureau of Internal Revenue that there are 12 cases of this character pending, involving approximately $625,000 in refunds."

The effective date of the Revenue Act of 1924 was June 2, 1924, and the effective date of Revenue Act of 1926 was February 26, 1926.

It is admitted by the Government that the taxes here involved were barred by the five-year statute of limitation prior to the effective date of the Revenue Act of 1924. (See Commissioner's letters of November 30, 1925, McDonnell R. 7; Truda R. 7.)

The court below in disposing of this case draws certain conclusions which are erroneous. In speaking of this Court's decision in *Aiken v. Burnet,* 282 U. S. 277, the opinion states (R. 13-14):

> "The court held that the taxpayer had sufficient authority, in the absence of any statute, to execute a valid waiver, and that the Commissioner, under the same circumstances, had authority to accept such waiver and bind the Government."

The authority for the waivers in the Aiken case was based on the broad authority of the Commissioner to promulgate regulations which have the force and effect of law. "In the absence of any statute" the said waivers were, of course, valid under the said regulations. Beginning with the 1921 Act there was, however, a statute governing waivers, so thereafter the authority for waivers was found in the statute and not in the regulations. Therefore if there was no statutory authority for the waivers here involved, they were invalid.

> "* * * When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. Raleigh, etc. R. R. Co. vs. Reid, 13 Wall. 269, 270; Scott vs. Ford, 52 Ore. 288, 296." (*Botany Worsted Mills vs. United States,* 278 U. S. 282, 289.)

The Court of Claims in the case at bar proceeds (R. 14):

> "Again in Brown & Sons Lumber Co. v. Burnet, *supra,* the court infers that the last of the three waivers involved in that case would have been sufficient standing alone. A foot-note in the opinion states: 'In-

> asmuch as the second and third waivers were in themselves sufficient to extend the period for collection, the first waiver may be disregarded in this connection as was done in the lower court. See 38 F. (2d) 428.' "

It is apparent from the foregoing that the Court of Claims has misunderstood the language in the Brown case. The courts there disregarded the first waiver and not the first and second waivers as the Court of Claims states. The second waiver was filed December 10, 1923, so the limitation had not run on June 2, 1924, when the Revenue Act of 1924 became effective. Consequently the waiver of October 25, 1924, was proper and did not attempt to revive limitations which had run prior to June 2, 1924.

The Court of Claims then states (R. 14):

> "In the Uncasville Mfg. Company case, the Court construed section 278(c) of the Revenue Act of 1924 as a prohibition upon the giving of a waiver by a taxpayer and the acceptance thereof by the commissioner. We are unable to find any provision in the 1924 revenue act which precludes a taxpayer from voluntarily waiving the benefits of the statute of limitations, nor do we find anything in such act prohibiting the commissioner's acceptance of such waiver."

The prohibition here involved is contained in Section 277 which prohibits assessment of 1917 taxes later than five years from the date the return was filed "except as provided in section 278 * * *." Therefore, in order to lawfully assess after the five years it must be shown that the case comes within the exceptions specified. In other words, the prohibition relied on is not with reference to waivers, but with reference to assessment after five years.

In the case at bar, however, the Court of Claims rests its opinion primarily on the following (R. 14-15):

> "* * * In Burnet v. Chicago Railway Equipment Co., supra in footnote 5, page 300, to the statement in the opinion that 'We need not determine whether respondent is correct in assuming that section 278(e) qualifies section 278(c) in respect to waivers on assessment of taxes barred prior to June 2, 1924,' it is stated that 'Subdivision (e) can not be said to qualify every other subdivision in section 278. Nothing indicates an intention to have it limit the effect of section 278(a) which permits assessment to be made or suit to be brought at any time in the case of a false or fraudulent return or a failure to file any return. * * * *Nor is there any indication that it should qualify subsection (c) which provides for the giving of waivers.* (Italics ours.)' We conclude, therefore, that the revenue act of 1924 does not (fols. 17 & 18) preclude a taxpayer from waiving the benefit of the statute of limitation, and that a waiver given after the enactment of the revenue act of 1924, in a case where the statutory limitation has expired prior thereto, and before February 26, 1926, is valid."

It is submitted that with the exception of the dicta appearing in the footnote in the Chicago Railway Equipment Company case, the case of *Pacific Coast Steel Co. vs. McLaughlin* (C. C. A. 9) 61 F. (2d) 73, now pending before this Court (No. 518) on petition for writ of certiorari, which followed the case at bar, is the only court expression to the effect that section 278(e) does not qualify sections 278(c) and (d).

Bowers v. N. Y. & Albany Lighterage Co., 273 U. S. 346, holds that subsection (e) qualifies subsection (d). At page 351 the Court states:

> "Later legislation assumes that the limitation under consideration applies to distraints as well as to suits. See section 278(d) and (e), Revenue Act of 1924, c. 234, 43 Stat. 253, 300. Section 278(d) provides that, where assessment is made within the prescribed time, the tax may be collected by distraint or by a proceeding in court within six years after the assessment. And section 278(e) provides:

> " 'This section shall not authorize the assessment of a tax or the collection thereof by *distraint* or by a proceeding in court if at the time of the enactment of this Act such assessment, *distraint*, or proceeding was barred by the period of limitation then in existence.'
>
> "This plainly implies that distraint might be barred. * * * "

Thereafter the Court again had occasion to discuss the effect of Section 278(e) on Subsection (d). In *Russell v. U. S.*, 278 U. S. 181, suit was filed by the United States against Russell in 1925, more than five years after a return for 1918 was filed, although assessment of the tax involved had been made within the five-year statutory period. The Court states (p. 188):

> "Paragraph (e) (2) of section 278 expressly directs that that section shall not affect any assessment made before June 2, 1924. Counsel for the United States maintain that to extend the time for bringing suit thereon does not 'affect' an assessment within the meaning of the paragraph. We cannot agree. Some real force must be given to the words used—they were not employed without definite purpose. The rather obvious design, we think, was to deprive section 278 of any possible application to cases where assessment had been made prior to June 2, 1924."

It is submitted that if in the Lighterage and Russell cases Section 278(e) qualified Section 278(d) there is no possible reason why in this case the same Section 278(e) should not qualify Section 278(e).

Still later the Court again passed upon the effect of Section 278(e). In *Florsheim Bros. Drygoods Co. v. U. S.*, 280 U. S. 453, the assessment was made after the passage of the 1924 Act within the period of limitations as extended by waivers under Section 250(d) of the 1921 Act. The Court in discussing limitations in the 1926 Act states (p. 467-8):

"* * * The situations intended to be excluded from the limitations prescribed were carefully specified in section 278(e): (1) assessments or collections already barred before the passage of that Act and (2) assessment made and proceedings begun prior to that time. * * * Compare *Russell v. U. S.*, 278 U. S. 181."

Other courts likewise have felt that Section 278(e) qualified Subsection (d).

In *U. S. v. Whyel*, 28 F. (2d) 30, the Court was confronted with a situation similar to that presented in *Russell v. U. S.*, 278 U. S. 181, and reached the same conclusion as this Court later reached in the Russell case. The Court states (p. 32-33):

"A. W. Gregg, Esq., general counsel of the Bureau of Internal Revenue and legislative expert, who directed the drafting of this act, in explaining the purpose of section 278 to the Senate finance committee, said that it was 'to keep this section from having any retroactive effect or to apply to things happening before its passage.' He further said that its purpose was 'to prevent the giving of any retroactive effect to the provisions of this act. The taxes under prior acts stand on their own footing, and this applies only after the passage of this act.'

"The Senate finance committee, in its official publication entitled 'Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715, and the Reasons Therefor, March 5, 1924,' at page 27, said with reference to section 278(e): 'This subdivision prevents the extension of this section to assessments or proceedings already begun under the existing law. * * *'"

U. S. v. Board, 14 F. (2d) 459, specifically holds that Section 278(e) qualifies Section 278(d) and that where collection was barred before June 2, 1924, the six-year period for collection does not apply.

"Although the additiontal tax was assessed within the five-year period, the time within which the tax could

be collected by distraint or proceedings in court having expired long before June 2, 1924, the effective date of the Revenue Act of 1924, such collection would not be authorized by the provisions of Section 278(d) of that Act since subdivision (e) of the section provides that the section shall not authorize a collection by proceedings in court if, at the time of the enactment of the act, such proceedings were barred by the period of limitation then in existence. * * * (*Gove v. Nichols*, 23 F. (2d) 856, 857.)"

The Commissioner also reached the same conclusion in G. C. M. 4253, C. B. Dec. 1928, p. 204.

In addition to the foregoing it seems that the statement in the footnote of the Chicago Railway Equipment Company case previously referred to, and the argument of the Court of Claims in this case is completely answered by Judge L. Hand in *Uncasville Mfg. Co. v. Commissioner*, 55 F. (2d) 893, as follows (pp. 895, 896):

"Confessedly, had the time for assessment expired after June 2, 1924, the waivers would have been good, though executed after the expiry of the time to assess or collect. Burnet v. Railway Equipment Co., 282 U. S. 295, 51 S. Ct. 137, 75 L. Ed. 349. However, section 278(e) of the Act of 1924 declared that the section as a whole should not allow the assessment or collection of a tax, barred by existing limitations on June 2, 1924. Subdivision (c) of section 278 is necessary to the assessments because they depended upon the waivers, and there was no other law regulating waivers in effect after June 2, 1924. Thus if subdivision (e) confines subdivision (c) to cases where the assessment was not barred on June 2, 1924, the company is right. In spite of some intimations in Burnet v. Chicago Railway Equipment Company, which, however, expressly reserved the point, we think that an analysis of section 278 as a whole does not admit of any other construction. As some confirmation we may note that in Russell v. U. S., 278 U. S. 181, 49 S. Ct. 121, 73 L. Ed. 255, subdivision (d), which concerns not assessment but collection,

was confined by the second part of subdivision (e) to assessments made after June 2, 1924.

"Subdivision (a) extends indefinitely the time for all assessments where the return was fraudulent, or there was none. This had already been done by second proviso of section 250(d) of the Act of 1921, and section 250(d) of 1918 had the same provision for fraudulent returns, though none for a failure to make any. Before 1918 there was a limit of three years for fraudulent returns and no returns. Section 2, Subdivision E, Act of 1913; section 9(a) Act of 1916. Subdivision (e) of section 278 of the Act of 1924 could not therefore affect subdivision (a), and so it was observed in Burnet v. Chicago Railway Equipment Co., because such assessment and collections were not barred on June 2, 1924.

"Subdivision (b) of section 278 refers to deductions taken in amortization of war investments, and extends indefinitely the time finally to assess deficiencies, because of these. This was already the law under the third proviso of section 250(d) of the Act of 1921, though there had been a limit in the Act of 1918 (§214 (a) (9), §234(a) (8)), as to tentative deficiences, which indeed remained in the identical sections of the Act of 1921. Thus the final assessment of such deductions had already been extended indefinitely, and subdivision (e) so far as it touched assessments at all did not apply to subdivision (b).

"Subdivision (d) did not concern assessments but collections, and for that matter has been confined to assessments made after June 2, 1924, as we have said. Therefore, as subdivision (e) limits the force of the section at large not only as to collection, but as to assessment, it must control assessments made under waivers, for there is no other assessment mentioned in the section on which it can operate. Unless then we construe it to mean that a waiver shall not revive a tax if the period of assessment has expired on June 2, 1924, we leave it in the air, qua assessments; it becomes brutum fulmen. This of course cannot be, and we therefore hold that the waivers did not revive the taxes."

The Board of Tax Appeals in the Uncasville case apparently did not consider or decide the effect of Section 278(e) upon Section 278(d). (See *Uncasville Mfg. Co.*, 19 B. T. A. 920.)

Unless Section 278(e) is given the construction just mentioned the entire subsection is meaningless.

The "waiver" cases previously decided by this Court do not control the present case. They all involve questions arising under other statutes and presenting entirely different facts. They should, however, be mentioned.

In *Stange v. U. S.*, 282 U. S. 270, the waiver involved was executed under the 1921 Act. It was held to be valid even though executed more than five years after the filing of the return; that although purporting to cover only assessments it was operative to extend the time for collection; that it was not a contract but rather a unilateral waiver of a defense.

Aiken v. Burnet, 282 U. S. 277, involved a waiver executed prior to the enactment of the 1921 Act. It held that a waiver was valid even though executed prior to the enactment of any statutory authority for the giving of waivers; that it waived the limitation prescribed in the subsequently enacted 1921 Act; that it covered war-profits tax as well as income tax; that although purporting to cover only assessment it was operative to extend the time for collection.

W. P. Brown & Sons Lumber Co. v. Burnet, 282 U. S. 283, added to the rules prescribed by the Stange and Aiken cases the rule that the extension of the period for collection until after a final determination by the Board of Tax Appeals in a case appealed to it is contemplated by Section 283(f) of the 1926 Act although the period for collection as extended by waivers expired after the appeal was taken.

Burnet v. Chicago Railway Equipment Co., 282 U. S. 295, has already been discussed and adds nothing to the law on waivers which is applicable here.

LEGISLATIVE HISTORY OF WAIVER PROVISIONS.

The first provision with reference to waiving the statute of limitations to appear in the revenue statutes was in Section 250(d) of the Revenue Act of 1921 wherein the period for assessment was set out and immediately thereafter appeared the following:

> "* * * unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax; * * *."

When the Revenue Act of 1924 was before Congress both the Ways and Means Committee Report (68th Congress, 1st Session, Report No. 179, p. 63) and the Finance Committee Report (68th Congress, 1st Session, Report No. 398, p. 32), stated with reference to Section 278(c):

> "A substantially similar provision is included in section 250(d) of the existing law."

Section 278(e) as it appeared in the House Bill (H. R. 6715, 67th Congress) stated:

> "This section shall not (1) authorize the assessment of a tax or the beginning of a proceeding in court for the collection of a tax if at the time of the enactment of this act such assessment or proceeding was barred by the period of limitation then in existence, * * *."

With reference to this section the Ways and Means Committee Report states (p. 64):

> "This subdivision prevents the extension of the section to assessments or proceedings already barred by the existing law, or to assessments or proceedings already begun under the existing law."

The Finance Committee changed the language of subsection (c) to read as it appears in the law. The Committee Report (p. 32) in discussing the change states:

> "This subdivision has been rewritten to make it clear that the section does not extend to assessments or distraint proceedings already barred by the existing law, or to assessments or distraint proceedings already begun under the existing law."

In order to understand Congressional policy on this question subsequent enactments may be helpful.

Section 278(c) of the Revenue Act of 1926 as contained in the House Bill (H. R. 1, 69th Congress) read:

> "This section shall not affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act, nor shall it authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence * * *"

As reported to the Senate and enacted into law Section 278(c) read as follows:

> "This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, * * *"

The only comment on the change is the statement of the Managers on the Part of the House at p. 42 of the Conference Report (69th Congress, 1st Session, Report. No. 356) as follows:

> "Amendment No. 85. This amendment rewrites in more definite language, and correcting clerical mis-

takes, subdivisions (d) and (e) of section 278 of the House bill, dealing with the time within which distraint or proceeding in court may be begun after the assessment has been made. The House recedes."

As passed by the House the Revenue Act of 1928 had a provision similar to the section in the 1926 Act just quoted. The Finance Committee changed the wording and meaning, however, so Section 276(b) of the Revenue Act of 1928 reads:

"(b) Waivers.—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

The Finance Committee Report (70th Congress, 1st Session, Report No. 960, p. 31) states:

"Section 276(b) of the House bill corresponds to section 278(c) of the revenue act of 1926 in so far as it provides that the commissioner and the taxpayer may extend the period for assessment of the tax for 1928 and subsequent years by an agreement in writing and that in such case the tax may be assessed at any time prior to the expiration of the period agreed upon. Section 276(b) of the House bill, however, goes somewhat further, in that it specifically provides that such a consent, usually called a 'waiver', shall be valid, even though it is executed after the commissioner's right to make the assessment has expired. In the interest of keeping cases closed after the running of the statute of limitations, the committee has stricken out the provisions of the House bill which make waivers in the case of taxes for 1928 and future years valid when they have been executed after the limitation period has expired."

Section 276(b) of the Revenue Act of 1932 provides:

> "Waivers.—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

The foregoing indicates a definite legislative policy to prevent the giving of waivers in cases where the statute of limitations had run.

CONCLUSION.

Unless the enactment of Section 278(e) is to be considered as meaningless, the Court below should be reversed.

ROBERT ASH,
Attorney for Petitioner.

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